

★ OCT 22 2013 ★

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**BROOKLYN OFFICE**

-----X  
HERBERT APONTE,

Petitioner,

-against-

NOT FOR PUBLICATION  
**MEMORANDUM & ORDER**  
13-CV-05149 (CBA) (LB)

MODICA (JUDGE) OF QUEENS CRIMINAL  
COURTHOUSE, NY,

Respondent.

-----X  
AMON, Chief United States District Judge.

On September 5, 2013, Herbert Aponte, proceeding pro se, filed this petition under 28 U.S.C. § 2254, challenging his 2006 conviction, in the Criminal Court of the City of New York, Queens County, for Attempted Stalking in the Third Degree, N.Y. Penal Law §§ 110.00 & 120.50, and Harassment in the First Degree, N.Y. Penal Law § 240.25. Aponte also sought in forma pauperis status and appointment of counsel. The petition was transferred to this Court from the United States District Court for the Southern District of New York by Order dated September 11, 2013. The Court now grants Aponte's request to proceed in forma pauperis solely for the purpose of this Order, denies his motion for appointment of counsel, and dismisses his habeas petition.

Aponte previously brought a § 2254 petition before this Court in September 2009. In February 2011, the Court dismissed that petition for lack of subject matter jurisdiction, finding that because Aponte's sentence – a one-year term of probation – terminated on June 22, 2007, he was not "in custody" as required for this Court to have jurisdiction under § 2254(a), see Aponte v. Brown, No. 09-CV-4334 (CBA), 2011 WL 797406, at \*2 (E.D.N.Y. Feb. 28, 2011) (citing Maleng v. Cook, 490 U.S. 488, 490-92 (1989)). Aponte sought a Certificate of Appealability

from the Second Circuit in order to appeal that determination; the Second Circuit denied his motion on August 18, 2011.

For the same reasons as stated in this Court's February 28, 2011 memorandum and order, Aponte's instant habeas petition is dismissed. Aponte is not in custody pursuant to the 2006 conviction because his probation terminated on June 22, 2007, and the Court is therefore without jurisdiction to hear his § 2254 petition. Since Aponte has failed to make a "substantial showing of the denial of a constitutional right," a Certificate of Appealability shall not issue. 28 U.S.C. § 2253(c). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith, and therefore denies in forma pauperis status for purposes of appeal. Coppedge v. United States, 369 U.S. 438, 444-46 (1962). The Clerk of the Court is directed to enter judgment and to close the case.

SO ORDERED.

Dated: Brooklyn, New York  
October 21, 2013

s/Carol Bagley Amon

  
Carol Bagley Amon  
Chief United States District Judge